Akamai Technologies Malaysia Sdn Bhd & Anor v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–150–03 OF 2022
AHMAD KAMAL J
7 NOVEMBER 2022

Revenue Law — Income Tax — Additional assessment — Whether taxpayer had shown strong case for grant of leave to apply to quash Inland Revenue Department ('IRD')'s decision requiring payment of huge tax arrears with penalties — Whether IRD's decision was founded on error of law — Whether taxpayer had shown special circumstances for court to order stay of execution of IRD's decision pending final determination of application to set it aside

The second applicant ('A2'), which was incorporated in Switzerland, was a provider of various internet services ('Akamai Services'). The first applicant ('A1') was A2's subsidiary in Malaysia. The applicants entered into a Services Reseller Agreement under which A1 was appointed as a non-exclusive reseller of Akamai Services directly to consumers in Malaysia. In consideration for the appointment, A1 had to pay A2 an annual fee ('services reseller payments'). In 2014, A2 sought a ruling from the respondent that the services reseller payments were not royalty as defined under s 2 of the Income Tax Act 1967 ('the ITA') and therefore was not subject to withholding tax under s 109 of the ITA as those payments fell under article 12 of the Malaysia-Switzerland Agreement for the Avoidance of Double Taxation. A2 provided the respondent with all necessary information and documents to show that its dealings with A1 did not involve any transfer of intellectual property or special knowledge, skill, expertise or know-how and neither did it involve the acquisition by A1 of any proprietary rights over the services provided by A2. After keeping mum for about eight years, the respondent in 2022 sent A1 notices of additional assessments for the years 2015 until 2019 requiring payment of a total sum of M32,073,667.33 as additional tax and penalties under the ITA ('the decision'). No reasons were given for the decision but it was obvious that despite A2's submissions, the respondent regarded the services reseller payments as royalties under s 2 of the ITA. The applicants sought leave to commence judicial review proceedings to quash the decision and to declare that the services reseller payments were not subject to withholding tax under s 109 of the ITA. The applicants also sought an order to stay the enforcement of the respondent's decision until the judicial review proceedings were fully and finally determined.

Held, granting both the leave application and stay of execution of the respondent's decision:

(1) The respondent's decision arose from an error of law amounting to a clear lack of jurisdiction. The respondent failed to recognise that the services reseller payments were not subject to withholding tax under s 109 of the ITA as they were not royalties within the meaning of article 12 of the Malaysia-Switzerland DTA (read together with the OECD Commentary on article 12). Accordingly, there was no basis for the respondent to disallow the deduction claimed by A1 for the payments made to A2 pursuant to s 39(1)(f) of the ITA (see paras 22–23).

(2) The respondents had failed to abide by the binding decisions of the Federal Court in *Director-General of Inland Revenue v Euromedical Industries Ltd* [1983] 2 MLJ 57 and the High Court in *Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources* (2016) MSTC 30–124 (affirmed by the Court of Appeal) and *Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30–033 (affirmed by the Court of Appeal) that pursuant to s 132 of the ITA and in the event of a conflict, the provisions of a double taxation agreement or a relief order would prevail over the ITA. It was decided in *Damco Logistic* that payments that had the following characteristics were not royalty and hence not subject to withholding tax under s 109 of the ITA — (a) where it was a contract for payment of services; (b) when there was no imparting of special commercial knowledge; and (c) when there was no transfer, grant or the use of know-how or property rights. Despite being referred to these decisions, the respondent proceeded to apply the definition of royalty under s 2 of the ITA (see paras 24–25 & 27).

(3) In arriving at its decision, the respondent did not appear to have considered the relevant provisions of the Malaysia-Switzerland DTA (which had been *gazetted* since 1975), thereby failing to perform its statutory duty under the ITA (see paras 29–30).

(4) The applicants had shown exceptional circumstances to warrant the grant of leave to commence judicial review proceedings against the respondent's decision despite the existence of an appeal process (see paras 34–35).

(5) The balance of convenience favoured the grant of a stay of execution/enforcement of the respondent's decision. The respondent's decision had created a significant tax liability on A1 and there was a genuine threat that the respondent might commence action against A1 and its directors for recovery pending the determination of the applicants' appeal at the Court of Appeal. This would amplify the irreparable harm and losses A1 would suffer if a stay was not granted. On the other hand, the respondent would not be affected if an interim stay

was granted as the respondent would still be able to collect the taxes imposed if the application was subsequently disallowed (see paras 52–53).

(6) The court also took into account the fact that if stay was not granted, A1 would be deprived of its money for a substantial period as there would be a delay in the Inland Revenue Board (IRB)'s tax refund process. Even if the applicants were to succeed in their appeal in the Court of Appeal, the respondent would refuse to refund the taxes pending any appeal. There was a clear pattern of the IRB failing to refund or delaying in refunding taxes in general (see para 5.1 of the Auditor-General's Report 2019). Furthermore, A1 would not receive any interest or compensation from any delay in refund by IRB and would be deprived of the interest that might be generated from the sum demanded if a stay was not granted (see paras 50–51).

[Bahasa Malaysia summary

Pemohon kedua ('A2'), yang diperbadankan di Switzerland, adalah penyedia pelbagai perkhidmatan internet ('Akamai Services'). Pemohon pertama ('A1') adalah anak syarikat A2 di Malaysia. Pemohon telah menandatangani perjanjian penjual semula perkhidmatan di mana A1 dilantik sebagai penjual semula bukan eksklusif Akamai Services terus kepada pengguna di Malaysia. Sebagai balasan untuk pelantikan tersebut, A1 terpaksa membayar A2 yuran tahunan ('bayaran perkhidmatan penjual semula'). Pada tahun 2014, A2 meminta ketetapan daripada responden bahawa bayaran perkhidmatan penjual semula bukan royalti seperti yang ditakrifkan di bawah s 2 Akta Cukai Pendapatan 1967 ('ACP') dan oleh itu tidak tertakluk kepada cukai pegangan di bawah s 109 ACP kerana bayaran tersebut jatuh di bawah perkara 12 Perjanjian Malaysia-Switzerland untuk Pengelakan Cukai Dua Kali. A2 memberikan responden semua maklumat dan dokumen yang diperlukan untuk menunjukkan bahawa urusannya dengan A1 tidak melibatkan sebarang pemindahan harta intelek atau pengetahuan khas, kemahiran, kepakaran atau pengetahuan dan tidak juga melibatkan pemerolehan oleh A1 sebarang hak proprietari ke atas perkhidmatan yang disediakan oleh A2. Selepas membisu selama kira-kira lapan tahun, responden pada 2022 menghantar notis A1 taksiran tambahan bagi tahun 2015 hingga 2019 yang memerlukan pembayaran sejumlah RM32,073,667.33 sebagai cukai tambahan dan penalti di bawah ACP ('keputusan tersebut'). Tiada alasan diberikan untuk keputusan tersebut tetapi jelas bahawa walaupun penyerahan A2, responden menganggap pembayaran perkhidmatan penjual semula sebagai royalti di bawah s 2 ACP. Pemohon meminta kebenaran untuk memulakan prosiding semakan kehakiman untuk membatalkan keputusan dan mengisytiharkan bahawa pembayaran perkhidmatan penjual semula tidak tertakluk kepada cukai pegangan di bawah s 109 ACP. Pemohon juga memohon perintah untuk menggantung penguatkuasaan keputusan responden sehingga prosiding

A semakan kehakiman ditentukan sepenuhnya dan muktamad.

Diputuskan, membenarkan kedua-dua permohonan kebenaran dan penggantungan pelaksanaan keputusan responden:

B (1) Keputusan responden timbul daripada kesilapan undang-undang yang menyebabkan kekurangan bidang kuasa yang jelas. Responden gagal mengiktiraf bahawa pembayaran perkhidmatan penjual semula tidak tertakluk kepada cukai pegangan di bawah s 109 ACP kerana ia bukan royalti dalam pengertian Perkara 12 DTA Malaysia-Switzerland (dibaca C bersama dengan Ulasan OECD mengenai Perkara 12). Sehubungan itu, tiada asas bagi responden untuk tidak membenarkan potongan yang dituntut oleh A1 bagi pembayaran yang dibuat kepada A2 menurut s 39(1)(f) ACP (lihat perenggan 22–23).

D (2) Responden telah gagal untuk mematuhi keputusan mengikat Mahkamah Persekutuan dalam *Director-General of Inland Revenue v Euromedical Industries Ltd* [1983] 2 MLJ 57 dan Mahkamah Tinggi dalam *Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources* (2016) MSTC 30–124 (disahkan oleh Mahkamah Rayuan) E dan *Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30–033 (disahkan oleh Mahkamah Rayuan) yang menurut s 132 ACP dan sekiranya berlaku konflik, peruntukan perjanjian cukai dua kali atau perintah pelepasan akan mengatasi ACP. Ia telah diputuskan dalam *Damco Logistic* bahawa pembayaran yang F mempunyai ciri-ciri berikut bukanlah royalti dan oleh itu tidak tertakluk kepada cukai pegangan di bawah s 109 ACP — (a) di mana ia merupakan kontrak untuk pembayaran perkhidmatan; (b) apabila tiada penyampaian pengetahuan komersial khas; dan (c) apabila tiada pemindahan, pemberian atau penggunaan pengetahuan atau hak harta. G Walaupun dirujuk kepada keputusan ini, responden terus menggunakan definisi royalti di bawah s 2 ACP (lihat perenggan 24–25 & 27).

(3) Dalam membuat keputusannya, responden nampaknya tidak mempertimbangkan peruntukan berkaitan DTA Malaysia-Switzerland (yang telah diwartakan sejak 1975), dengan itu gagal melaksanakan H kewajipan berkanunnya di bawah ACP (lihat perenggan 29–30).

(4) Pemohon telah menunjukkan keadaan luar biasa untuk menjamin pemberian kebenaran untuk memulakan prosiding semakan kehakiman terhadap keputusan responden walaupun terdapat proses rayuan I (lihat perenggan 34–35).

(5) Baki kemudahan memihak kepada pemberian penggantungan pelaksanaan/penguatkuasaan keputusan responden. Keputusan responden telah mewujudkan liabiliti cukai yang ketara ke atas A1 dan terdapat ancaman sebenar bahawa responden mungkin memulakan

tindakan terhadap A1 dan pengarahnya untuk mendapatkan semula sementara menunggu keputusan rayuan pemohon di Mahkamah Rayuan. Ini akan meningkatkan kemudaratan yang tidak boleh diperbaiki dan kerugian yang akan dialami oleh A1 jika penggantungan tidak diberikan. Sebaliknya, responden tidak akan terjejas sekiranya tempoh penggantungan sementara diberikan kerana responden masih boleh mengutip cukai yang dikenakan jika permohonan tersebut tidak dibenarkan kemudiannya (lihat perenggan 52–53).

(6) Mahkamah juga mengambil kira fakta bahawa jika penggantungan tidak diberikan, A1 akan dilucutkan wangnya untuk tempoh yang besar kerana akan berlaku kelewatan dalam proses pembayaran balik cukai Lembaga Hasil Dalam Negeri (LHDN). Walaupun pemohon berjaya dalam rayuan mereka di Mahkamah Rayuan, responden akan menolak untuk memulangkan cukai sementara menunggu sebarang rayuan. Terdapat corak jelas LHDN gagal membayar balik atau melengahkan pembayaran balik cukai secara umum (lihat perenggan 5.1 Laporan Ketua Audit Negara 2019). Tambahan pula, A1 tidak akan menerima sebarang faedah atau pampasan daripada sebarang kelewatan pembayaran balik oleh LHDN dan akan dilucutkan faedah yang mungkin dijana daripada jumlah yang dituntut jika penggantungan tidak diberikan (lihat perenggan 50–51).]

Cases referred to

Chang Shu Hua (P) v Goon Fook Hong [2008] 3 MLJ 10; [2008] 1 MLRA 137; [2008] 3 CLJ 429, CA (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473; [1989] 1 MLRA 189; [1989] 1 CLJ Rep 9, SC (refd)

Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (2011) MSTC 30–033 (folld)

Director-General of Inland Revenue v Euromedical Industries Ltd [1983] 2 MLJ 57; [1983] CLJ Rep 128, FC (folld)

Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2021] MLJU 1229; [2021] 9 CLJ 918, HC (refd)

Godfrey Philips (Malaysia) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] MLJU 1573; [2011] 1 MLRH 758; [2011] 9 CLJ 670, HC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185; [1986] 1 MLRA 207; [1987] CLJ Rep 110, SC (refd)

Kerajaan Malaysia v Ekran Bhd [2006] 2 MLJ 749; [2005] 4 MLRH 177; [2006] 5 CLJ 92, HC (refd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105; [1995] 1 MLRA 213; [1995] 2 CLJ 701, SC (refd)

Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources (2016) MSTC 30–124 (folld)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 1 MLRA 536; [2003] 4 CLJ 1, FC (refd)
Nasioncom Holdings Bhd v Suruhanjaya Sekuriti [2008] 4 MLJ 620; [2007] 3 MLRH 771; [2008] 7 CLJ 355, HC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 MLRH 507; [2006] 1 CLJ 927, CA (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478; [2012] 4 MLRA 257, FC (refd)
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128; [2002] 3 MLRH 313; [2003] 1 CLJ 210; [2003] 1 AMR 352, HC (refd)

Legislation referred to

Income Tax Act 1967 ss 2, 33, 39(1)(f), 91, 91(3), 103(1), 106(3), 109, 113(2), 132
Rules of Court 2012 O 53, O 53 rr 2(4), 3(5), O 92 r 4

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Mohamad Hafidz Ahmad (with Nurul Nasyrah) (Revenue Counsel, Inland Revenue Board of Malaysia) for the putative respondent.

Ahmad Kamal J:

INTRODUCTION

[1] The applicants filed an application for leave to commence judicial review proceedings (encl 1) under O 53 of the Rules of Court 2012 ('the ROC') seeking inter alia, the following orders:

(a) that the applicants be granted leave of this honourable court to file an application for:

(i) an order for certiorari to quash the respondent's decision in the form of the notices of additional assessment for the Years of Assessment (YAs) 2015, 2016, 2017, 2018 and 2019 dated 31 December 2021 (together with the cover letter dated 31 December 2021) all of which were received by the first applicant by email on 5 January 2022 (the respondent's decision) on the grounds that it was illegal, void, unlawful and/or in excess of authority, in breach of the rules of natural justice, had been irrational and/or unreasonable; and in breach of the applicants' legitimate expectations;

(ii) a declaration that:

(1) the payments made by the first applicant to the second applicant pursuant to the services reseller agreement dated 13 March 2013

(services reseller payments) are not subject to withholding tax under s 109 of the Income Tax Act 1967 ('the ITA') as such payments are not royalty within the meaning of article 12 of the Malaysia-Switzerland Agreement for the Avoidance of Double Taxation (which is *gazetted* vide PU (A) 242/1975) (Malaysia-Switzerland DTA) (and read together with the Organization for Economic Co-operation and Development (OECD) Commentary on article 12); and

(2) accordingly, there is no basis for the respondent to disallow the deduction claimed by the first applicant for the payments made to the second applicant pursuant to s 39(1)(f) of the ITA.

(iii) a declaration that the services reseller payments are not in any event, subject to withholding tax under the ITA;

(iv) a declaration that the respondent's decision arises from an error of law as it has erroneously applied the definition of royalty under s 2 of the ITA, instead of the definition under article 12 of the Malaysia-Switzerland DTA;

(v) a declaration that the respondent's decision arises from an error of law as it has failed to realise that it is bound by and must give effect to the decisions of the superior courts in *Director-General of Inland Revenue v Euromedical Industries Ltd* [1983] 2 MLJ 57; [1983] CLJ Rep 128, *Ketua Pengarah Hasil Dalam Negeri v Thomson Reuters Global Resources* (2016) MSTC 30–124, and *Damco Logistic Malaysia Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (2011) MSTC 30–033. These decisions have held that by applying s 132 of the ITA in the event of conflict, the provisions of a double taxation agreement or a relief order should prevail over the ITA;

(vi) a declaration that the respondent's decision arises from an error of law and excess of jurisdiction as it has failed to apply the binding principles established by the High Court in *Damco Logictic* that the following characteristic of payment is not royalty and therefore not subject to withholding tax under s 109 of the ITA:

(1) when it is a contract for payments of services;

(2) when there is no imparting of special commercial knowledge;

(3) when there is no transfer, grant or the use of know-how or propriety rights;

(4) a declaration that the respondent in arriving at its decision committed a blatant failure to perform its statutory duty under s 132 of the ITA by failing to give effect to the provisions of the Malaysia-Switzerland DTA;

(5) a declaration that the respondent in arriving at its decision committed a blatant failure to perform its statutory duty under s 91(3) of the ITA ie, by failing to consider whether there has been any fraud, negligence or wilful default on the part the first applicant in issuing the time-barred assessments for YAs 2015 and 2016;

(6) a declaration that the respondent's decision was made in breach of natural justice for failing to provide the first applicant with reasons for issuing the time-barred assessments for YAs 2015 and 2016;

(7) a declaration that the respondent's decision was made in breach of natural justice for failing to provide the first applicant with reasons for imposing a 45% penalty amounting to RM9,953,896.76 against the first applicant under s 113(2) of the ITA;

(8) an order for mandamus to compel the respondent to adopt the same tax treatment for other YAs moving forward ie, that the services reseller payments are not subject to withholding tax under the ITA and consequently the said payments are deductible by the first applicant under s 33 of the ITA;

(9) an order for prohibition to prohibit the respondent from taking any enforcement action, steps and/or commencing any proceedings in relation to the respondent's decision until the full and final determination of the validity of the respondent's decision in this application filed pursuant to O 53 of the ROC;

(b) that all further proceedings including the enforcement of the decision be stayed until the full and final determination of the application to quash the decision;

(c) that all necessary and consequential directions and orders be given;

(d) that the costs of this application be costs in the cause; and

(f) all other and further relief which this honourable court deems fit and proper.

[2] In gist, the applicants' application for leave to apply for; among others, an order for certiorari to quash the respondent's decision in the form of the notices of additional assessment for the YAs 2015, 2016, 2017, 2018 and 2019 dated 31 December 2021 (together with the cover letter dated 31 December 2021) all of which were received by the first applicant on 5 January 2022.

[3] After the hearing, I allowed the applicants' application (encl 1). This judgment contains the full reasons for my decision.

BACKGROUND FACTS

[4] The narration of the background facts herein is adopted with and/or without modification from the statement and affidavit in support.

[5] The second applicant is a company incorporated in Switzerland and is a tax resident in Switzerland. The second applicant provides internet content delivery, security and cloud infrastructure services for accelerating and improving the delivery of content and applications over the internet (Akamai Services). In essence, Akamai Services help organizations improve the user experiences of their websites and increase the effectiveness of their internet focused operations. The second applicant owns all intellectual property rights in respect of Akamai Services in connection with non-North American territory.

[6] The first applicant is a subsidiary of the second applicant. The first applicant is a company incorporated in Malaysia on 13 March 2013, and a non-exclusive reseller of Akamai Services.

[7] On 13 March 2013, the first applicant and second applicant (the applicants) entered into a services reseller agreement under which, amongst others:

(a) the second applicant appoints the first applicant as a non-exclusive seller to market, resell and support the second applicant's Akamai Services directly to customers predominantly in Malaysia;

(b) the first applicant will pay the second applicant an annual fee for the right to market, resell and support the second applicant's Akamai Services in Malaysia (services reseller payments);

(c) the services reseller payments are calculated as a fixed percentage of the first applicant's revenue from reselling the second applicant's Akamai Services; and

(d) the second applicant owns all the Akamai AG trademarks and rights therein (cl 4.5.1). The second applicant also owns all rights, title and interest of the intellectual property rights (cl 6.2).

[8] The following summarises the key aspects of the second applicant's Akamai Services which were communicated to the respondent on 1 July 2021:

(a) the second applicant's Akamai Services primarily involve managing the flow of the Malaysian customers' digital content on the internet. The activities performed by the second applicant do not involve the supply of any know-how, proprietary rights, knowledge and/or experience that

A can be used by the first applicant and/or the Malaysian customers for its own account. By contrast, the second applicant applies its own knowledge and experience to perform a service;

(b) intellectual property is not transferred from the second applicant to the first applicant. The first applicant will not obtain any proprietary rights over the services provided by the second applicant nor will it exploit any know-how. There is no transfer of special knowledge, skills or expertise to the first applicant or the customers;

(c) the second applicant is responsible for delivering the services resold by the first applicant. It is the second applicant's duty to ensure that it uses its special knowledge, skills and expertise to guarantee the results of the services provided; and

(d) further, the first applicant and/or the Malaysian customers are not given the use of, or the right to use any copyrights, software, artistic or scientific works, patents, designs or models plans secret processes or formulae, trademarks or other like property or rights at all material times.

[9] The applicants' position is that pursuant to article 12 of the Malaysia-Switzerland DTA, the services reseller payments are not royalty, and accordingly are not subject to withholding tax under s 109 of the ITA.

[10] As a matter of prudence, on 16 April 2014, the second applicant through its tax consultants applied to the respondent for a ruling to confirm the applicants' position that the services reseller payments are not royalty and not subject to withholding tax under the ITA (the ruling application).

[11] On 18 December 2018, the respondent commenced an audit on the first applicant. Between 2018 and 2021, over the course of three years, the first applicant provided the respondent with all necessary information and documents.

[12] On 5 January 2022, the first applicant received the respondent's decision in the form of the assessment for YAs 2015, 2016, 2017, 2018 and 2019 dated 31 December 2021. The respondent through its decision is demanding taxes and penalty amounting to RM32,073,667.33 from the first applicant as follows:

YA	Additional Tax (RM)	Penalty (RM)	Total (RM)
2015	4,558,510.25	2,051,329.61	6,609,839.86
2016	6,102,370.80	2,746,066.86	8,848,437.66
2017	2,120,228.16	954,102.67	3,074,330.83

YA	Additional Tax (RM)	Penalty (RM)	Total (RM)
2018	5,215,596.48	2,347,018.42	7,562,614.90
2019	4,123,064.88	1,855,379.20	5,978,444.08
			32,073,667.33

[13] The applicants contend that the respondent's decision arises from errors of law, suffers from a clear lack of jurisdiction, a blatant failure to perform its statutory duties under ss 91 and 132 of the ITA, and resulted in serious breaches of the principles of natural justice:

(a) the respondent arrived at its decision based on the definition of royalty in s 2 of the ITA. The respondent failed to give any consideration whatsoever to article 12 of the Malaysia-Switzerland DTA nor gave any reasons why it has chosen to ignore the provisions of the Malaysia-Switzerland DTA; and

(b) the respondent failed to provide any reasons whatsoever for issuing the time-barred assessments and to impose penalty at 45% amounting to RM9,953,896.76 on the first applicant.

[14] On 24 January 2022, the respondent similarly rejected the second applicant's ruling application by applying the definition of royalty under s 2 of the ITA. The respondent stated that the services reseller payments are akin to payments for the right to use software by the first applicant's customers in Malaysia.

[15] Accordingly, the applicants submit that there are no facts in dispute. The only issues at hand are questions of law arising from the interpretation of the services reseller agreement between the first applicant and the second applicant, which include:

(a) whether the respondent committed an error of law in applying the definition of royalty under s 2 of the ITA, instead of the definition under article 12 of the Malaysia-Switzerland DTA (read together with the OECD Commentary on article 12)?

(b) whether the respondent committed an error of law and/or exceeded its jurisdiction by failing to apply the binding principles established by the Federal Court which held that by applying s 132 of the ITA and in the event of conflict, the provisions of a double taxation agreement or a relief order should prevail over the ITA?

(c) whether the respondent committed an error of law and/or exceeded its jurisdiction by failing to apply the binding principles established by the High Court which held that the following characteristic of payment is

not royalty and therefore not subjected to withholding tax under s 109 of the ITA:

(i) when it is a contract for payment of services;

(ii) when there is no imparting of special commercial knowledge; and

(iii) when there is no transfer, grant or the use of know-how or propriety rights.

(d) whether the respondent committed a blatant failure to perform its statutory duty under s 132 of the ITA by failing to give effect to the provisions of the Malaysia-Switzerland DTA?

(e) whether the respondent committed a blatant failure to perform its statutory duty under s 91(3) of the ITA ie, its failure to consider whether there has been any fraud, negligence or wilful default on the part of the first applicant in issuing the time-barred assessments for YAs 2015 and 2016?

(f) whether the respondent's decision was made in breach of natural justice in failing to provide the first applicant with reasons for issuing the time-barred assessments for YAs 2015 and 2016? and

(g) whether the respondent's decision was made in breach of natural justice in failing to provide the first applicant with reasons for imposing a 45% penalty amounting to RM9,953,896.76 against the first applicant under s 113(2) of the ITA?

THE LAW

[16] The Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 at 303; [2012] 4 CLJ 478; [2012] 4 MLRA 257, speaking through Suriyadi Halim Omar FCJ (as he then was) held:

> ... Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favor of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[17] The test laid down for leave to commence a judicial review in *WRP Asia Pacific Sdn Bhd* are as follows:

(a) whether the subject matter is amenable to judicial review; and if so

(b) from the materials available, whether the application is frivolous and if not thought as frivolous, to consider that the applicant has an arguable case to obtain the relief sought at the substantive hearing.

[18] The principles governing applications for leave to commence judicial review proceedings have also been set out in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 at p 69; [2006] 1 MLRH 507; [2006] 1 CLJ 927 where Gopal Sri Ram JCA (as he then was) held:

> [10] ... the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous ... So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-judiciable.

[19] It is trite that the applicant will have to satisfy the tests propounded in the abovementioned cases to secure the leave to commence the judicial review proceedings. At this stage, the court need not go into the merits of the case, but only to see if the subject matter is amenable to judicial review or whether the application for leave is frivolous.

[20] In any event, a judicial review is the discretion of the court, the application for leave to commence judicial review may be allowed in exceptional circumstances as explained by the then Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185; [1986] 1 MLRA 207; [1987] CLJ Rep 110 which held:

> Held: allowing the appeal: (1) the discretion is still with the courts to act by way of judicial review but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

THE DECISION OF THE COURT

[21] It is the finding of this court that the applicants have shown that they are adversely affected by the decision of the respondent. Order 53 r 2(4) of the ROC provides that:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[22] Having perused the cause papers, I am of the view that the respondent's decision arises from an error of law amounting to a clear lack of jurisdiction.

[23] I find that the respondent had failed to recognize that the services reseller payments paid under the service reseller agreement are not subject to withholding tax under s 109 of the ITA as such payments are not royalty within the meaning of article 12 of the Malaysia-Switzerland DTA (read together with the OECD Commentary on article 12), and that accordingly, there is no basis

for the respondent to disallow the deduction claimed by the first applicant for the payments made to the second applicant pursuant to s 39(1)(f) of the ITA.

[24] The respondent also failed to abide by the binding decisions of the Federal Court in *Euromedical Industries* and the High Court in *Thomson Reuters* (affirmed by the Court of Appeal), and *Damco Logistic* (affirmed by the Court of Appeal) that pursuant to s 132 of the ITA and in the event of the conflict, the provisions of a double taxation agreement or a relief order should prevail over the ITA.

[25] Added to that, I find that the respondent also failed to abide by the binding decision of the High Court in *Damco Logistic* (affirmed by the Court of Appeal) that payment with the following characteristics are not royalty, and hence not subject to withholding tax under s 109 of the ITA:

(a) where it is a contract for payment of services;

(b) when there is no imparting of special commercial knowledge; and

(c) when there is no transfer, grant or the use of know-how or propriety rights.

[26] Based on the above characteristics, the services reseller payments are clearly not royalty, and hence not subject to withholding tax under s 109 of the ITA.

[27] Despite being referred to repeatedly to the superior courts' decisions above, the respondent proceeded with its impugned decision by applying the definition of royalty under s 2 of the ITA.

[28] Section 132 of the ITA has given primacy to DTAs and requires the respondent to give effect to their provisions.

> 132 Double taxation arrangements
>
> (1) If the Minister by statutory order declare that:
>
> (c) arrangements specified in the order *have been made by the Government with the government of any territory outside Malaysia with a view of affording relief from double taxation* in relation to tax under this Act or other taxes of every kind under any written law and any foreign tax of that territory; and
>
> (d) It is expedient that those arrangement should have effect, then, *so long as the order remains in force, those arrangements shall have effect in relation to tax under this Act* or other taxes of every kind under any written law notwithstanding anything in any written law. (Emphasis added.)

[29] However, I noticed that the respondent in arriving at its decision did not appear to have ever considered the relevant provisions of the

Malaysia-Switzerland DTA. Therefore, it is clear that the respondent had failed to perform its statutory duty under the ITA.

[30] Further, I find that the Malaysia-Switzerland DTA has been *gazetted* since 1975. The applicants have been consistent in their position that the services reseller payments are not royalty and have disclosed this to the respondent since 2014. It should also be noted that other jurisdictions like India have confirmed that the payments are not royalty and not subject to withholding tax.

[31] Therefore, it is clear that the respondent's decision here is an unexplained departure from existing understandings of tax principles as encapsulated within s 132 of the ITA and the superior courts' decisions in *Euromedical Industries*, *Damco Logistic* and *Thomson Reuters*.

[32] The respondent's decision has resulted in an apparent inconsistency in treatment between India and Malaysia of DTA treaty obligations with Switzerland.

[33] The material facts and the applicants' tax treatment have been disclosed to the respondent since 2014 via the second applicant's ruling application. Despite this, the respondent only issued its decision in 2021. In doing so, the respondent failed to raise any allegations of fraud, wilful default or negligence as required by this court in *Ensco Gerudi (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2021] MLJU 1229; [2021] 9 CLJ 918 to justify the imposition of the time-barred assessment for YAs 2015 and 2016.

SHOULD LEAVE BE GRANTED

[34] It remains the case that the threshold at the leave stage is very low and the result of every leave application turns on its own facts based on the test. The facts of the present matter clearly demonstrate that leave for judicial review is warranted. The applicants have shown a prima facie case that there are exceptional circumstances relating to the decision.

[35] In regards to the alternative remedy argument, this court finds that once the applicants have clearly demonstrated exceptional circumstances as alluded to in the above, it warrants a judicial review process by the court in this present matter despite the existence of an appeal process.

STAY

[36] It is to be noted that a decision made by a public decision making body could be stayed by an order of the court.

[37] The High Court in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja' afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128; [2002] 3 MLRH 313; [2003] 1 CLJ 210; [2003] 1 AMR 352 had held that:

> The phrase 'a stay of the proceedings' must have a wider application. It does not confine to proceedings in a court only. Today, many applications for judicial review are for orders of certiorari to quash decisions of decision-making bodies other than courts, including government ministers, local authorities and other bodies whose decisions are susceptible to judicial review. Thus, the phrase 'a stay of the proceedings' in relation to such bodies must mean a stay of the process by which the decision challenged has been reached, including the decision itself. Thus, as had been decided in *Ex parte Avon County Council*, a decision made by an officer or minister of the crown as well as other relevant decision-making bodies can, in principle, be stayed by an order of the court. That the court should have the power to order a stay of a decision of a decisionmaking body pending the conclusion of a challenge to the decision-making process by way of judicial review.

[38] In determining whether a stay of the decision ought to be granted in judicial review proceedings, the special circumstances test as laid out by the Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 1 MLRA 536; [2003] 4 CLJ 1 applies. In *Nasioncom Holdings Bhd v Suruhanjaya Sekuriti* [2008] 4 MLJ 620; [2007] 3 MLRH 771; [2008] 7 CLJ 355 Lau Bee Lan J (as she then was) held:

> [16] It is trite that the grant of leave in judicial review proceedings is an exercise of the court's discretion and consequently pursuant to O 53 r 3(5) of the RHC which states, 'The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question' is likewise discretionary.

[39] The Court of Appeal in *Chang Shu Hua (P) v Goon Fook Hong* [2008] 3 MLJ 10; [2008] 1 MLRA 137; [2008] 3 CLJ 429 acknowledged that the category of what constitutes special circumstances is not closed, and ought to be interpreted flexibly. The court stated:

> [34] Other factors must be taken into account in applying the special circumstances approach. These factors, and they are not exhaustive, may be listed follows:
>
> (a) whether damages would be an adequate remedy if the applicant who applies for the stay succeeds in his appeal?
>
> (b) the public policy consideration that has to be taken into account;
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> (c) the need to examine the subject matter of the appeal;
>
> (d) the need to weigh in a balance of the hardship of the parties involved;
>
> (e) the delay in filing the application for a stay;
>
> (f) whether the court would exercise its inherent jurisdiction to grant the stay; and

(g) where would the balance of convenience or the balance of justice lie? A

[40] In *Godfrey Philips (Malaysia) Sdn Bhd v Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] MLJU 1573; [2011] 1 MLRH 758; [2011] 9 CLJ 670, Mohd Zawawi Salleh J (as he then was) observed the difference between a stay of execution of a decision of a public body and a stay of execution of a judgment of a court as follows: B

> [28] It must be noted that a stay of the proceedings as in a suspension of a unilateral ex parte decision of an administrative decision maker is drastically different thing from a stay of execution of a judgment of a court of law after a full-blown trial and a determination on the merits have been made inter parties. An attempt to equate the two processes would be inappropriate. C
>
> [29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the first respondent from acting on the impugned decision dated 21 January 2010, the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equities tips in its favour, and that a stay and/or prohibition order is in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant. D E

[41] In relation to tax matters, the existence of the provisions of ss 103(1) and 106(3) of the ITA does not prohibit the court's jurisdiction to grant stay until the full and final determination of the judicial review application and/or appeal to the Court of Appeal. Sections 103(1) and 106(3) of the ITA state as follows: F

> 103 Payment of tax
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> (1) Except as provided in subsection (2), tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment. G
>
> 106 Recovery by suit
>
> (3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103 (1A), (3), (4), (5), (6), (7) or (8). H

[42] In *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 1 MLRA 213; [1995] 2 CLJ 701, the then Supreme Court in applying its earlier decision in *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 MLRA 189; [1989] 1 CLJ Rep 9 has clearly stated that: I

> [18] With respect, in our view, neither s 103(1) nor s 106(3), bars a court, in appropriate circumstances, from exercising its inherent powers of granting a stay, even in a tax case, (see Supreme Court decision in *Chong Woo Yit v Government of*

Malaysia [1989] 1 MLJ 473 at p 475; [1989] 1 MLRA 189; [1989] 1 CLJ 9 Col 2, last para per Gunn Chit Tuan CJ).

[43] The grant of stay pending the disposal of the proceedings is discretionary. In *Kerajaan Malaysia v Ekran Bhd* [2006] 2 MLJ 749; [2005] 4 MLRH 177; [2006] 5 CLJ 92 Lau Bee Lan J (as she then was) has stated that:

> ... It is not disputed that the power to grant stay of proceedings or execution pending appeal is a discretionary exercise of power premised on s 73 of the Courts of Jurisdiction Act 1964.

[44] In exercising the discretion, the court would need to consider whether there are special circumstances which warrant an interim stay. It must also be borne in mind that the granting of an interim stay does not relieve the applicant from the liability from the payment of the tax assessed but is merely a stay on the enforcement until the disposal of the appeal at the Court of Appeal. The power of the court to grant an order for an interim stay lies within O 53 r 3(5) and/or O 92 r 4 of the ROC.

[45] Further, I find that there is no explicit ouster clause within the ITA that limits the court's inherent powers to grant stay as the granting of a stay does not relieve the applicant from the liability of the tax. This means preserving the status quo by suspending the decision under challenge pending the determination of disposal of appeal in the Court of Appeal, which as a result, will not deny the applicant the full benefit of a successful challenge.

[46] In the present application, the applicants urge this court to preserve the status quo of the applicants in respect of the respondent's decision including payments of taxes until the full and final determination of its judicial review application. Herein, which as a result will not deny the applicants the full benefit of a successful challenge.

[47] The applicants urge this honourable court to preserve the applicants' status quo as the implementation of the respondent's decision will result in significant tax liabilities which would adversely and unfairly affect the first applicant.

[48] The respondent's decision is premised upon a clear error of law, a serious breach of the principles of natural justice, and a blatant failure to perform its statutory duty. There is also a genuine threat that the respondent may invoke its powers under the ITA to demand payment of the disputed tax against the first applicant and its directors.

[49] The first applicant has remitted the services reseller payments to the second applicant for YAs 2015, 2016, 2017, 2018 and 2019 after having received no indication that this was incorrect from the respondent since 2014. The respondent's actions in only arriving at its decision eight years later in 2022 shows that the respondent would suffer no prejudice should a stay be granted until the disposal of encl 1.

DELAY OF TAX REFUNDS

[50] If stay is not granted, the first applicant will be deprived of its money for a substantial period as there will be a delay in the Inland Revenue Board (IRB)'s tax refund process. Even if the applicants are successful in their appeal in the Court of Appeal, the respondent will refuse to refund the taxes pending any appeal. There is a clear pattern of the IRB failing to refund or delaying in refunding taxes in general (see para 5.1 of the Auditor General Report 2019).

[51] It shall also be noted that the first applicant will not receive any interest or compensation from any delay in the refund by the IRB. The first applicant will be deprived of the interest that may be generated from the sum demanded if a stay is not granted.

BALANCE OF CONVENIENCE

[52] Further, I find that the balance of convenience lies in favour of the applicants:

(a) the respondent's decision has created significant tax liability on the first applicant. There is genuine threat that the respondent may invoke his powers under the ITA to demand payment of the assessed taxes and penalty by commencing civil actions against the first applicant and its directors for recovery of taxes pending the determination of the applicants' appeal at the Court of Appeal. This would amplify the irreparable harm and losses to the first applicant if a stay is not granted; and

(b) on the other hand, the respondent would not be affected by this court's decision to grant an interim stay pending the determination of the applicants' appeal at the Court of Appeal. The respondent will still be able to collect the taxes imposed in the event that the application is subsequently disallowed.

[53] Based on the above, a stay of execution of the decision pending final determination of the judicial review was therefore granted.

A CONCLUSION

[54] Premised on the above, this court granted order in terms of the applicants' application (encl 1).

B *Application for leave and stay of execution of the respondent's decision granted.*

Reported by Ashok Kumar

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